

**IN THE MATTER OF THE APPLICATION REGARDING CONVERSION  
OF PREMIER BLUE CROSS AND ITS AFFILIATES**

Washington State Insurance Commissioner's Docket # G02-45

PRE-FILED RESPONSIVE TESTIMONY OF:

**John M. Steel**

April 15, 2004

CONFIDENTIAL and PROPRIETARY  
NOT FOR PUBLIC DISCLOSURE

1 **Q. Please state your name.**

2 A. John M. Steel.

3 **Q. Are you the same John M. Steel who filed direct testimony on March 31,**  
4 **2004, in this proceeding?**

5 A. Yes.

6 **Q. Have you read the pre-filed direct testimony filed in this matter by the OIC**  
7 **Staff, the OIC Staff's consultants, and the intervenors?**

8 A. Yes. In particular, I have focused upon the pre-filed direct testimony of witnesses  
9 whose testimony is referenced and addressed in this responsive testimony.

10 **Q. Have you reviewed the pre-filed direct testimony of Mr. Cantilo? And, if so,**  
11 **what is your response to it?**

12 A. Yes, I did. Mr. Cantilo's pre-filed direct testimony adopted and attached the  
13 reports that he had previously filed in this matter, in addition to making several  
14 corrections to those reports. Despite the corrections, Mr. Cantilo does not appear to have  
15 changed his views materially. So my response to his testimony is largely the same as my  
16 response to his reports. My response to those reports is set forth in my pre-filed direct  
17 testimony and in my previous reports. I hereby incorporate my reports and previous pre-  
18 filed testimony by reference.

19 **Q. Did you review the transcript of the deposition of Mr. Cantilo taken on**  
20 **March 10 and March 22, 2004?**

21 A. Yes, I did.

22 **Q. In your pre-filed direct testimony, you stated that Premera's status as a not-**  
23 **for-profit corporation does not automatically render it a charitable**  
24 **corporation or cause its assets to be impressed with a charitable trust under**  
**Washington law. Did any of the statements made by Mr. Cantilo in his**  
**deposition testimony change your views?**

1 A. No, his testimony has tended to reinforce my views. Mr. Cantilo testified that he  
2 was not aware of any statutory obligation upon conversion to dedicate assets to the public  
3 benefit in Washington (Cantilo Deposition 3/10/04, pp. 11-12).<sup>1</sup> He admitted that he was  
4 not prepared to express an opinion as to whether Washington law would impose a  
5 charitable trust upon Premera's assets (*id.*, p. 13) and that his law firm had simply  
6 assumed for purposes of this transaction that Premera was a charitable organization (*id.*,  
7 p. 14). He also noted that he did not believe that a nonprofit corporation is automatically  
8 a charitable corporation under Washington law (*id.*, pp. 17-19). Finally, he opined that  
9 under the common law, a gift must be charitable in nature or the *cy pres* doctrine is  
10 inapplicable (*id.*, p. 19).

11 **Q. Did Mr. Cantilo discuss his use of the term "charitable purpose" with respect**  
12 **to Premera? Does this change your view concerning Premera's charitable**  
**status?**

13 A. Mr. Cantilo testified that Premera's "charitable purpose" was to provide coverage  
14 on a nonprofit basis (*id.*, p. 43). He also stated that he had not reviewed Premera's  
15 Articles of Incorporation to compare the purposes set forth there with the Washington  
16 Legislature's definition of charitable purpose (*id.*, p. 50). In my pre-filed direct  
17 testimony, I stated that I believe that Premera is essentially a commercial enterprise that  
18 would be difficult to classify as a charitable organization under Washington legal  
19 principles outlined in my testimony, and that Premera is not and never has been eligible  
20 to be a public benefit corporation. My views have not changed as a result of Mr.  
21 Cantilo's testimony.

22  
23  
24 <sup>1</sup> A copy of the pages from the Cantilo deposition to which I refer are attached hereto as Exhibit A.

1 **Q. Did Mr. Cantilo state any views in his deposition on whether a board of**  
2 **directors is under any legal constraints in distributing a nonprofit**  
3 **corporation's assets upon dissolution if the nonprofit corporation is not a**  
4 **charitable corporation?**

5 A. Yes. He testified that he knew of no such constraints, assuming no such  
6 constraint arose either from the articles and bylaws or from the way in which the assets  
7 were conveyed to the corporation (*id.*, pp. 56-58). I previously discussed in detail in my  
8 reports the fiduciary duties of the directors in connection with the Proposed Conversion  
9 and concluded that Premera's Board of Directors has met its fiduciary duties with respect  
10 to the Proposed Conversion.

11 **Q. Did Mr. Cantilo state an affirmative opinion as to Premera's obligations,**  
12 **based upon either charitable trust or public ownership principles?**

13 A. No. Mr. Cantilo stated that his firm had not been asked to analyze or express a  
14 view on the applicability of the charitable trust or public ownership issues (*id.*, p. 63).

15 Mr. Cantilo testified that he had been instructed by counsel for the OIC Staff to  
16 assume that the assets of Premera were deemed to be charitable (*id.*, p. 57). As I stated in  
17 my Supplemental Report, this "assumption" as to the existence of charitable trust  
18 restrictions is surprisingly cavalier, since a fundamental threshold issue is involved.

19 Mr. Cantilo testified that he considered and discussed privately the consequences  
20 of making a different assumption about Premera's legal obligations.<sup>2</sup> He understood, he  
21 said, "that some concerns articulated in our reports about the proposed structure of the  
22 transaction would have a lot less merit or no merit at all if there were not a requirement  
23 for the conveyance of a specific consideration of value by Premera to the foundations as  
24 part of the conversion." (Cantilo Deposition 3/22/04, p. 287.) Among other things, he

---

<sup>2</sup> Email and other documents reflect doubts by Mr. Cantilo and his colleagues about the factual premises for his assumption. See Cantilo Deposition 3/22/04, pp. 294-98, 300-02.

1 said, “criticisms of the impact of stock restrictions in reducing the value of the assets  
2 transferred would on that ground be inapplicable.” (*Id.*, p. 288.)

3 **Q. Scott Benbow asserts in his pre-filed direct testimony that Premera’s assets**  
4 **are not and never were owned by Premera. Mr. Benbow then asserts that, if**  
5 **the assets are owned by anyone, it is the people of Washington and Alaska.<sup>3</sup>**  
6 **Do you agree?**

7 A. Absolutely not. Premera, as a corporation, owns its assets. Mr. Benbow cites no  
8 authority, nor can he, for his general proposition that Premera does not own its assets. As  
9 I stated in my direct testimony, Premera is essentially a commercial enterprise, deriving  
10 its assets from premium payments and income from investments. It is not, and never has  
11 been, eligible to be a public benefit corporation under Washington law.

12 **Q. Mr. Benbow also asserts that Premera “has an obligation to set aside” its**  
13 **assets for charitable purposes.<sup>4</sup> How do you respond?**

14 A. Mr. Benbow cites no authority for this assertion, and I am aware of none. It  
15 appears that he is simply making an assumption, much like Mr. Cantilo, for which he  
16 lacks evidence. Such an assumption cannot qualify as a legal finding or conclusion. As  
17 Mr. Cantilo has admitted: “Our assumption has no force of law.” (Cantilo Deposition  
18 3/22/04, p. 288.)

19 **Q. Steven Larsen states in his pre-filed direct testimony that your Supplemental**  
20 **Report appears to question whether Premera has an obligation to transfer**  
21 **the fair value of Premera to the Washington and Alaska Foundations.<sup>5</sup> Mr.**  
22 **Larsen goes on to say that acceptance of this view would impair the**  
23 **Commissioner’s ability to determine that the proposed conversion is in the**  
24 **public interest. Please comment on Mr. Larsen’s assertions.**

A. I stated in my Supplemental Report that since there has been no showing that  
Premera is a charitable organization or that its assets are subject to a charitable trust, the

---

<sup>3</sup> Pre-filed Direct Testimony of Scott Benbow at 4.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> Pre-filed Direct Testimony of Steven Larsen at 3.

1 transfer of assets to the Washington and Alaska Foundations in the Proposed Conversion  
2 will be a purely voluntary act of Premera, not required by the Holding Company Act or  
3 Washington corporate or trust law. As a voluntary donor, Premera is entitled under  
4 Washington law to impose whatever requirements it desires as to the use of the donated  
5 assets.

6 Mr. Larsen's comment ignores a key point made in my Supplemental Report—  
7 namely, that after the Proposed Conversion there will be an “unlocking” of enormous  
8 value that will become available to the Washington and Alaska Foundations. In this  
9 respect, the Proposed Conversion certainly is in the public interest.

10 **Q. Robert A. Crittenden states that the members of his organization, the**  
11 **Washington Academy of Family Physicians, are “beneficiaries of the**  
12 **nonprofit assets held by Premera.”<sup>6</sup> Please comment on Dr. Crittenden’s**  
13 **assertion.**

14 A. I have concluded that the proposed asset transfers are in compliance with  
15 PREMERA's Articles of Incorporation regarding dissolution and in compliance with  
16 Washington law regarding dissolution. I see no legal basis for the assertion that  
17 physicians are “beneficiaries” of Premera's assets.

18 **Q. Does that conclude your testimony?**

19 A. Yes.  
20  
21  
22  
23

24 <sup>6</sup> Pre-filed Direct Testimony of Robert A. Crittenden at 4.

**VERIFICATION**

I, JOHN M. STEEL, declare under penalty of perjury of the laws of the State of Washington that the foregoing answers are true and correct.

Dated this \_\_\_\_ day of April, 2004, at Seattle, Washington.

\_\_\_\_\_  
/s/

JOHN M. STEEL

**EXHIBIT A**

**JOHN M. STEEL**

**EXHIBIT A**



BEFORE THE INSURANCE COMMISSIONER  
OF THE STATE OF WASHINGTON

In the Matter of the Application  
Regarding the Conversion and  
Acquisition of Control of Premera Blue  
Cross and its Affiliates

NO. G 02-45

**COPY**

DEPOSITION UPON ORAL EXAMINATION OF

PATRICK H. CANTILO

March 10, 2004  
Seattle, Washington

Taken Before:

PAMELA J. KLESSIG, RPR, CCR No. 2948  
Registered Professional Reporter  
of  
CAPITOL PACIFIC REPORTING, INC.  
2401 Bristol Court S.W.  
Olympia, WA 98502  
Phone: (360) 352-2054  
Fax: (360) 754-4240  
Toll Free: 1-800-407-0148  
e-mail: capitol@callatg.com



1       may be asked to do additional work, and we certainly will do  
2       that if we're asked to do so.

3   Q   Are you aware of whether there has been any follow-up work  
4       done on these topics by others?

5   A   No.

6   Q   No, you are not aware?

7   A   Correct.

8   Q   Do you have any expectation, Mr. Cantilo, as to how the  
9       matter of this Oregon claim will be ultimately resolved?

10  A   Not really, no. I speculate that there will be discussions  
11       between the two offices and the issue may be resolved that  
12       way, but I don't really know.

13  Q   If the issue cannot be resolved by discussion, Mr. Cantilo,  
14       how do you anticipate that it will be resolved?

15  A   I do not have an anticipation about that.

16  Q   Can we look at the memo, please, which is - I guess starts  
17       after the two-page cover letter. I want to direct your  
18       attention to page two, if I might. Under the Discussion, the  
19       third sentence, you observe that "In some states, there has  
20       been a statutory obligation to dedicate assets to the public  
21       benefit upon conversion." See that language?

22  A   I do.

23  Q   And am I correct in my understanding that such an obligation,  
24       where it exists, exists by dint of a specific conversion  
25       statute?

1 A Not exclusively.

2 Q What else are you thinking of here?

3 A I believe that the import of the Model Nonprofit Corporation  
4 Act in those states which have adopted it has the same  
5 effect.

6 Q They continue to say that "no such statutory obligation is  
7 identified in the Oregon letter, and" your "research has not  
8 revealed the existence under Oregon law of an applicable  
9 statutory obligation of this nature." Do you see that?

10 A Yes.

11 Q Has Oregon adopted the Model Nonprofit Corporation Act?

12 A I frankly don't recall.

13 Q Your point here seems to be that there is no specific  
14 statutory obligation to dedicate assets to the public benefit  
15 upon conversion under Oregon law. Is there such a statutory  
16 obligation under Washington law, Mr. Cantilo?

17 A There is not a conversion statute under Washington law, and  
18 Washington has not adopted the Model Nonprofit Corporation  
19 Act. We have not been asked to research the broad question  
20 about which you just asked, so I can't tell you whether there  
21 are other laws.

22 Q So if I understand what you're saying correctly, it is that  
23 there might be such a statute but you're not aware of it?

24 A That's correct.

25 Q The end of the same paragraph, Mr. Cantilo, you observe that

1 "statutory provisions of Oregon law seem to compel the  
2 contrary conclusion that LifeWise cannot be deemed a  
3 charitable organization." Do you see that?

4 A That's correct.

5 MR. MITCHELL: Let's go off the record for a  
6 second.

7 (Discussion off the record.)

8 (Kathy Baxter is present via  
9 telephone. Sarah Patterson is not  
present.)

10 Q Mr. Cantilo, if Washington statutes compel the conclusion  
11 that Premera Blue Cross cannot be considered a charitable  
12 organization, would it not follow that no charitable trust  
13 could be imposed upon its assets either?

14 A Well, that calls for some speculation, because you'd have to  
15 look at all the facts of the company's history.

16 Q But my question, sir, is if Washington statutes compelled the  
17 conclusion that Premera Blue Cross cannot be deemed to be a  
18 charitable organization, would it not follow that it would  
19 not be permissible to impose a charitable trust upon its  
20 assets?

21 A I understood your question.

22 Q Can you answer, please?

23 A I did. I'm not prepared to express an opinion without having  
24 done work that we have not actually done in this case.

25 Q Let's then turn over to page three, if we might. There's a

1 major heading called The Tax-Exempt Question Considered. Do  
2 you see that?

3 A I do.

4 Q Five lines down in the first paragraph appears this  
5 statement: "Premera is itself a taxable corporation, yet it  
6 is still considered a charitable organization."

7 A Yes.

8 Q One of the problems with passive voice is it is impossible to  
9 tell sometimes what the subject of the sentence might be, and  
10 so my question to you is, by whom is Premera still considered  
11 a charitable organization?

12 A In the context of this paragraph, it is so considered for  
13 purposes of the proposed transaction.

14 Q So, are you saying here that you and your law firm are  
15 assuming that it's a charitable organization?

16 A Well, not exclusively but we are for purposes of this  
17 transaction, yes. I believed, we believed at the time this  
18 was written that all the parties involved in this transaction  
19 made that assumption.

20 Q And you believed that Premera made that assumption as well?

21 A Yes.

22 Q You may recall at our prior deposition, Mr. Cantilo, we  
23 looked at a couple of letters that had been written by  
24 Premera in June of 2002 to the attorney general's office and  
25 to the commissioner of insurance in the state of Washington

- 1 A I'm not sure whether by that you mean the holding company and  
2 Premera Blue Cross, but Premera Blue Cross has been  
3 tax-exempt, perhaps the holding company has not.
- 4 Q Can you turn over to page four, please. In the last  
5 paragraph ahead of the heading 2. Form Versus Substance, the  
6 third-to-the-last sentence reads: "C&B agrees that the  
7 purpose of the assets plays an important role in determining  
8 whether the assets are charitable." Do you see that?
- 9 A Yes.
- 10 Q Do you agree with that proposition for purposes of your  
11 Washington reports as well as your analysis of the Oregon  
12 claim?
- 13 A We have not been asked to evaluate this issue in the context  
14 of the Washington report.
- 15 Q Do you have any reason to believe that if you were asked to  
16 evaluate the question in the context of your Washington  
17 reports, that your conclusion about the role, the purpose of  
18 the assets would be any less important?
- 19 A Obviously the response to that question calls for some  
20 speculation, but all other things being equal I think the  
21 purpose of the assets is always a material consideration.
- 22 Q On the top of page five, Mr. Cantilo, you make an observation  
23 about the definition of the charitable corporation under  
24 Oregon law in the first paragraph. Do you see that?
- 25 A Yes.

1 Q And you also make an observation about the definition of a  
2 public benefit corporation under Oregon law. Do you see  
3 that?

4 A Yes.

5 Q Am I correct in my understanding that you did not at any  
6 point evaluate whether Premera is either charitable or a  
7 public benefit corporation under Washington law?

8 A I frankly don't recall whether we've done so or not. That  
9 was not part of our engagement.

10 Q Can you turn over to page seven, please, in the middle of the  
11 page, under the heading iii. Common Law of Gifts and the  
12 Doctrine of Cy Pres, the first paragraph concludes that the  
13 Oregon attorney general apparently "believes that a  
14 for-profit company owned by a nonprofit company is presumed  
15 to be charitable, at least unless proven otherwise." And you  
16 observe that "There is no support offered (and none can be  
17 found) for such a presumption." Do you see that?

18 A Yes.

19 Q Is there any support of which you are aware for the  
20 proposition that a nonprofit corporation is presumed to be  
21 charitable under Oregon law?

22 A No.

23 Q How about under Washington law, Mr. Cantilo?

24 A Again, although we have not been engaged to look at that, I  
25 don't believe that that's a principle of Washington law, that

1 a nonprofit corporation is automatically a charitable  
2 corporation.

3 Q At the bottom of page seven is a sentence that begins "The  
4 funding of LifeWise must be deemed a gift that is charitable  
5 in nature, or otherwise, the cy pres doctrine is  
6 inapplicable." Do you see that?

7 A No. Where is this?

8 Q Very last line on page seven, continuing on to page eight?

9 A I see. Yes.

10 Q Do you agree with this proposition?

11 A I think that's probably correct.

12 Q And would you agree with that proposition if, as a matter of  
13 Washington law, that a gift must be charitable in nature or  
14 otherwise the cy pres doctrine is inapplicable?

15 A Assuming that only common law applies and there's no  
16 statutory provision that's relevant, I think that's a correct  
17 statement.

18 Q Can you turn to the page 10, please, Mr. Cantilo. Actually,  
19 at the bottom of page nine, the sentence begins:  
20 "Derivatively the assets would continue to benefit Premera's  
21 ultimate constituency, the citizens of Washington." Do you  
22 see that line?

23 A I do.

24 Q First of all, can you tell me what you mean by the word  
25 constituency as you use it in this sentence?



- 1 A Yes.
- 2 Q My first question to you concerns the phrase "management's  
3 decision to convert." Do you see that?
- 4 A I do see those words.
- 5 Q In fact, was it not the board of directors of Premera, not  
6 its management, that made the decision in this case to pursue  
7 a conversion?
- 8 A There's a little bit of a chicken-and-egg issue there. I  
9 suspect - well, I believe that management recommended to the  
10 board that the company needed to undertake a transaction like  
11 the proposed conversion and that the board approved that.  
12 Whether you characterize that as a management decision or a  
13 board decision I suppose is open to some debate.
- 14 Q Let me ask you now about the last two words of this sentence,  
15 "charitable purpose." What is your understanding of  
16 Premera's, quote, "charitable purpose," closed quote?
- 17 A To provide its coverages on a nonprofit basis.
- 18 Q Anything else?
- 19 A Well, I assume without having looked at this issue that, in  
20 addition, Premera probably does have corporate charitable or  
21 a gift-giving program, as do many other companies, and I  
22 would include that within that as well.
- 23 Q The latter comment, Mr. Cantilo, is that also a fairly common  
24 phenomenon in for-profit companies?
- 25 A Yes.

1 make reference to the "Articles of Incorporation of LifeWise  
2 of Oregon." Do you see that?

3 A I do.

4 Q And you compare the purposes of the articles of incorporation  
5 of that corporation with the definition of a charitable  
6 purpose under Oregon law. Do you see that?

7 A I do.

8 Q Am I correct in my assumption, Mr. Cantilo, that you did not  
9 look at the articles of incorporation for Premera or compare  
10 the purposes set forth therein with the Washington  
11 legislature's definition of a charitable purpose?

12 A I don't recall having done that. That was not part of our  
13 engagement. I suspect we might have seen the articles of  
14 incorporation of Premera at various times during our  
15 analysis, but it would not have been for this purpose.

16 Q And in the penultimate sentence of the same paragraph, you  
17 say "There is no evidence to support the proposition that  
18 Premera intended that the funding of LifeWise of Oregon," I  
19 think you mean to say as "a gift that was charitable in  
20 nature." Did you examine the funding of Premera to determine  
21 whether there was a charitable gift in that instance?

22 A First, the sentence, I think, was intended to be written as  
23 it is in fact on that page. And second, the answer to your  
24 question is no, we did not look at that issue with respect to  
25 Washington.

1 upon dissolution going anywhere the board of directors so  
2 chooses?

3 A I don't know. You'd have to know how the company came by its  
4 assets and whether its organizational documents provide such  
5 a constraint.

6 Q I asked you to assume that it was not a charitable  
7 corporation. I guess your point is that if the assets were  
8 required to be distributed in some form or fashion because of  
9 the way they came to the corporation, that would have to be  
10 taken into consideration?

11 A That's one circumstance.

12 Q Are there others?

13 A Yes. The organizational documents themselves may provide for  
14 the method of distribution independent of how the company got  
15 its assets in the first place.

16 Q And the board would presumably have to follow what its  
17 articles of incorporation and bylaws said about the  
18 distribution upon dissolution, would it not?

19 A Once again, you'd have to look at the articles and bylaws of  
20 the company to know whether the board, under some  
21 circumstances, might be excused from adhering to those  
22 provisions.

23 Q Assuming that the board does adhere to those provisions,  
24 Mr. Cantilo, is there any legal constraint or external  
25 constraint on the board in making a choice among potential

1 recipients of such assets?

2 A Assuming that no such constraint arises from the way in which  
3 the assets were first conveyed to the corporation and that no  
4 such constraints arise from the organizational documents?

5 Q Correct.

6 A I know of none sitting here today.

7 Q Now, in Exhibit 2, in a couple of places, both in text and  
8 footnote, you make clear that you're making an assumption for  
9 purposes of your analysis that the assets of Premera are all  
10 deemed to be charitable. My question to you, sir, is was  
11 there some instruction that you received from some party -  
12 I'm sorry, from somebody in this proceeding that you should  
13 make such an assumption?

14 A Yes.

15 Q Who so instructed you?

16 A I believe it was Mr. Hamje. This is very early in the  
17 process so I don't recall exactly, but I believe it was  
18 Mr. Hamje.

19 Q And was that instruction in writing?

20 A I don't recall it being in writing but it may have been in  
21 writing as well. I certainly recall it being oral.

22 Q Can you recount for me as best you can the conversation in  
23 which that instruction was given?

24 A I can tell you the substance; I can't tell you the words,  
25 though, when it happened. When we were first engaged I posed

1 the question as to whether we were being asked to analyze  
2 precisely the question of whether or not Premera had a  
3 charitable trust or some other obligation to distribute its  
4 assets to the citizens of Washington and Alaska, and I was  
5 told that we were not being asked to analyze that question,  
6 that that issue was not in contention, that the company  
7 recognized that obligation.

8 Q Did Mr. Hamje indicate to you the source of his knowledge or  
9 understanding on that point?

10 A I don't think so.

11 Q Mr. Cantilo, what rule of law governs how a nonprofit,  
12 non-charitable corporation is to distribute its assets upon  
13 dissolution?

14 A I suppose you'd have to put together the organizational  
15 documents and the applicable statutes.

16 Q And by "applicable statutes" are you referring to the  
17 nonprofit corporation statute?

18 A It depends on the jurisdiction on which you're working.

19 Q Let's assume in Washington.

20 A I believe that's true.

21 Q I want to ask you now about the supplemental report, which is  
22 Exhibit 3 to your deposition. First of all, Mr. Cantilo, can  
23 you please tell us the sequence in which the supplemental  
24 report and the executive summary were drafted?

25 A That is hard to say. I believe there was one comprehensive

1 identified, apart from the ones that I had. He may have had  
2 discussions with others but I can't think of them right now.

3 Q Did any member of your office have any conversations with any  
4 Washington lawyer other than the four gentlemen associated  
5 with the attorney general's office and the office of  
6 insurance commissioner that you've identified in connection  
7 with the conclusions regarding matters of Washington law  
8 expressed in your supplemental report?

9 A Not that I can recall.

10 Q Would the same answer be given, Mr. Cantilo, if I asked about  
11 the conclusions of Washington law expressed in your executive  
12 summary?

13 A Yes.

14 Q Am I correct in inferring from your testimony this morning,  
15 Mr. Cantilo, that you've not looked at either charitable  
16 trust or public ownership interests - public ownership issues  
17 since the date of the original report?

18 A No, I don't know that that's the case. I actually don't  
19 recall everything I looked at. We have not been asked to  
20 analyze and so did not express a view on the applicability of  
21 those issues to the issues in the report. It is possible  
22 that in the course of the work that we did, we ran across or  
23 even looked at some of the law that affects those issues as  
24 well, but it would not have been for the purpose of  
25 expressing a view as to obligations devolving upon Premera.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

I, PAMELA J. KLESSIG, a duly authorized Court Reporter and Notary Public in and for the State of Washington, residing at Olympia, do hereby certify:

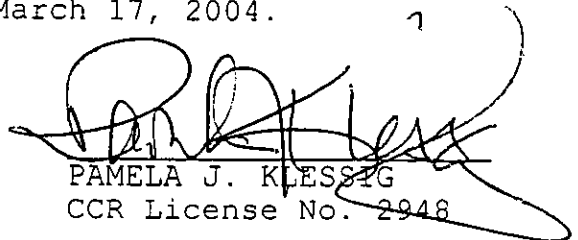
That the foregoing deposition of PATRICK H. CANTILO, was taken before me on March 10, 2004 and thereafter transcribed by me by means of computer-aided transcription, that the deposition is a full, true and complete transcript of the testimony of said witness;

That the witness, before examination, was by me duly sworn to testify the truth, the whole truth and nothing but the truth, and that the witness RESERVED signature.

That I am not a relative, employee, attorney or counsel of any party to this action or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

That upon completion of signature, if required, I shall herewith securely seal the original deposition transcript and serve the same upon MR. ROBERT B. MITCHELL, counsel for PREMIERA and Premiera Blue Cross.

IN WITNESS HEREOF, I have hereunto set my hand and affixed my official seal this March 17, 2004.

  
PAMELA J. KLESSIG  
CCR License No. 2948

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

~~~~~

Day 2 - Pg. 234-414

## 234



1 Q And you say that because you understood the scope of your  
2 engagement to be congruent with the instructions that you had  
3 received from Mr. Hamje?

4 A Well, much more specifically than that, Mr. Mitchell. The  
5 scope of our engagement was described by the personal  
6 services contract into which our firm entered with the OIC.

7 Q At any point during your work on this project, Mr. Cantilo,  
8 did you consider the consequences of making a different  
9 assumption about the supposed legal obligation on the part of  
10 Premera to dedicate 100 percent of its assets to charitable  
11 purposes?

12 A Yes.

13 Q And when did you consider that?

14 A Probably from the very beginning.

15 Q Can you describe for me what consequences you considered?

16 A I can't tell you, Mr. Mitchell, that I considered specific  
17 consequences. But I understood and, at least in internal  
18 discussions within our firm, expressed a view that some  
19 concerns articulated in our reports about the proposed  
20 structure of the transaction would have a lot less merit or  
21 no merit at all if there were not a requirement for the  
22 conveyance of a specific consideration or value by Premera to  
23 the foundations as part of the conversion.

24 Q Is there a conversation you had with Mr. Taktajian or others?

25 A Mr. Taktajian, Mr. Riou, R-i-o-u, probably representatives of

1 Blackstone, PricewaterhouseCoopers, LeBoeuf Lamb, Signal  
2 Hill, and perhaps the OIC, as well, and probably Attorney  
3 General's Office in Washington.

4 Q And which aspects of your report would have a lot less merit  
5 under those circumstances?

6 A If we were to assume that applicable law does not require  
7 that Premera convey any specific or determinable amount of  
8 assets to a foundation, criticisms of the impact of stock  
9 restrictions in reducing the value of the assets transferred  
10 would on that ground be inapplicable.

11 That's an illustration; I did not mean to give you a  
12 comprehensive list.

13 Q Is there some reason, Mr. Cantilo, why your reports make  
14 repeated references to legal requirements without disclosing  
15 that such requirements exist solely by dint of your starting  
16 assumption?

17 A Probably an effort to avoid boredom and repetition.

18 Q You refer many times in your report to the requisite value to  
19 be transferred. That notion of requisite value is a direct  
20 and -- a direct consequence of the assumption you made at the  
21 beginning of your analysis, right?

22 A Yes.

23 Q Doesn't exist independent of that assumption, does it?

24 A Well, I'm not sure I understand your question.

25 Our assumption has no force of law. The assumption

1 is a fair-market-value-transfer requirement. And so we would  
2 discuss how to satisfy that requirement.

3 Q I'm going to hand you what's been marked as Exhibit 8,  
4 Mr. Cantilo. Would you take a moment to look at that  
5 document and identify it, please.

6 A (Perusing document.) Okay. I've looked at the e-mails.

7 Q Can you confirm that this is an exchange, more accurately an  
8 e-mail to you from Mr. Taktajian, dated March 19, 2003,  
9 attaching an e-mail message from Rusty Fallis, dated  
10 March 18, 2003?

11 A Yes.

12 Q Want to focus initially on the top of page 2, which is  
13 Mr. Fallis's underlying e-mail. The second sentence  
14 indicates -- states as follows: "I previously discussed with  
15 Patrick, very briefly, the question of whether it would be  
16 necessary to determine whether Premera is a charitable  
17 corporation." Continuing, "There are several reasons why it  
18 would be nice to avoid that issue if possible," paren, "(I  
19 think that Patrick agrees with me on this point)," close  
20 paren.

21 My question to you, sir, is whether you recall the  
22 discussion with Mr. Fallis to which he refers in his e-mail.

23 A I recall generally having had that discussion, but I could  
24 not begin to tell you the specific words that anybody used.

25 Q Did you tell Mr. Fallis that you had been instructed to

1       assume that Premera had a legal obligation to convey  
2       100 percent of the fair market value and not to analyze the  
3       question of whether such an obligation existed by dint of  
4       charitable-trust principles?

5   A    Yes, I think I did.

6   Q    If that is so, Mr. Cantilo, why was Mr. Fallis still talking  
7       about the desirability of avoiding the issue?

8   A    I'm speculating, Mr. Mitchell. But I assume that,  
9       notwithstanding what assumption the OIC might make with  
10       respect to that issue, perhaps Mr. Fallis thought that it  
11       would be prudent for the Attorney General's Office to be  
12       prepared to address that issue on its merits.

13   Q    Would you now focus on the message from Mr. Taktajian and  
14       specifically on the last sentence in the second paragraph.  
15       Can you read that sentence aloud, please?

16   A    Is it the sentence that against with the word "Furthermore"?

17   Q    It is.

18   A    "Furthermore, I doubt the OIC or AG would want to be put in a  
19       position where it would have to publicly admit that  
20       charitable trust law may not apply for a variety of reasons  
21       including the fact that the underlying theory by behind the  
22       foundation's receipt of the nonprofit assets' FMV is cy  
23       pres."

24       "Cy pres" is c-y p-r-e-s.

25   Q    This language suggests that the OIC and the Attorney

1 General's Office share an interest in avoiding the question;  
2 is that correct?

3 A Yes.

4 I'm sorry. I should be more specific. It's not  
5 avoiding the question. It's avoiding having to litigate the  
6 question.

7 Q Can you explain the reference or the statement in the -- this  
8 sentence about "the underlying theory behind the foundation's  
9 receipt of the nonprofit assets'" fair market value "as cy  
10 pres"?

11 A I'm not sure I understand your question.

12 Q Can you explain for me the statement that you just read  
13 aloud, not the first part, which has to do about not wanting  
14 to be put in a position to publicly admit something, but the  
15 statement about the reasons, including the fact the  
16 underlying theory is cy pres?

17 A I'm assuming, Mr. Mitchell, that when he wrote this,  
18 Mr. Taktajian himself assumed that, independent of whatever  
19 Premera and the OIC might think, from the AG's perspective it  
20 is the common-law cy pres doctrine that gave rise to the  
21 obligation.

22 Q That would be true, would it not, from the OIC's perspective  
23 as well as the AG's perspective?

24 A I don't know the answer to that. I suppose you would have to  
25 ask Mr. Hamje or Mr. Odiorne that question.

1 Q You, however, assumed that to be the case, did you not?

2 A No. If I understood your question correctly, no.

3 Q why not?

4 A we did not look into the -- all of the bases for the assumed  
5 obligation of Premera to transfer its fair market value.

6 Q I'm going to hand you what's been marked as Exhibit 9. Take  
7 a moment, Mr. Cantilo, and confirm for me that this is an  
8 exchange of e-mails between yourself and Mr. Fallis extending  
9 over the period from February 14<sup>th</sup> to March 24<sup>th</sup> of 2003.

10 A (Perusing document.)

11 (Deposition Exhibit No(s). 11  
12 through 13 marked for  
13 identification.)

14  
15 THE WITNESS: Yes.

16 Q (By Mr. Mitchell) I want to direct your attention to the  
17 e-mail message from you to Mr. Fallis dated March 21, 2003,  
18 which begins on page 3 of this exhibit and continues to  
19 page 4. would you look, please, at page 4?

20 A Yes.

21 Q Paragraph that begins toward the top of the page begins "A  
22 couple of days ago." Do you see that?

23 A Yes.

24 Q You say in that paragraph a few lines down -- and I quote --  
25 "while PREMERA possesses some historical charitable

1 attributes, it is patently not a typical charity," close  
2 quote. Do you see that?

3 A Yes.

4 Q Down a few lines more you say that it is "most difficult and  
5 metaphysical when we try to apply 'cleanly' or strictly  
6 fundamental principles that were apparently intended to  
7 govern the affairs of somewhat different entities, like  
8 traditional charities." Do you see that language?

9 A I do.

10 Q And you say two sentences on that you are -- and I quote --  
11 "concerned that the organizational documents may not impose  
12 on PREMERA nearly as inviolable a charitable obligation as  
13 one typically finds in more traditional public benefit  
14 organizations," close quote. Do you see that?

15 A Yes.

16 Q Now, this analysis, as set forth of your e-mail to Mr. Fallis  
17 dated March 21<sup>st</sup>, is flatly inconsistent with the  
18 assumption that underlies your reports, is it not?

19 A No.

20 Q Why not?

21 A Well, what assumption do you have in mind, Mr. Mitchell?

22 Q The assumption that Premera has a fundamental legal  
23 obligation to convey 100 percent of its fair market value to  
24 charitable entities to be created as a result of the  
25 conversion.

1 square peg in a round hole because there's not a perfect  
2 match between the transaction and those statutory  
3 applications.

4 Q I'm going to hand you Exhibit 10 to your deposition,  
5 Mr. Cantilo.

6 A (Perusing document.)

7 Q Can you confirm for me, Mr. Cantilo, that Exhibit 10 is an  
8 e-mail exchange between yourself Mr. Fallis dating to June of  
9 2003?

10 A I think, in addition to Mr. Fallis and myself, Mr. Taktajian  
11 and Mr. Koplovitz were recipients of the exhibit also.

12 Q It's a fair point, Mr. Cantilo.

13 But it is also the case, is it not, that you and  
14 Mr. Fallis were directly exchanging messages on this string?

15 A Yes.

16 Q I want to draw your attention to the second paragraph of  
17 Mr. Fallis's message on the first page of Exhibit 10, and in  
18 particular, the parenthetical in the first sentence of that  
19 paragraph. Do you see the reference there to, quote," our  
20 considerable uncertainty as to whether PREMERA is a  
21 charitable corporation," close quote?

22 A Yes.

23 Q You shared the uncertainty to which Mr. Fallis alluded here,  
24 didn't you?

25 A I don't think I had enough information to have a strong view



1 on that subject. Although, I had previously made the  
2 observation that it was different in material respects from  
3 what I would consider a traditional charity in the sense of  
4 Red Cross, Salvation Army, and others.

5 Q So did you understand the pronoun "our" in the -- in that  
6 sentence to be a reference to the Attorney General's Office  
7 as opposed to Mr. Fallis and yourself?

8 A To be honest with you, I probably didn't focus on that word.  
9 I don't know whether I thought then that Mr. Fallis was  
10 referring just to the AG's Office, or to us and the AG's  
11 Office. And I'm not sure now whether he meant it one way or  
12 the other.

13 Q There are other references in the same sentence to "we" -- do  
14 you see that? -- both the first clause and then in saying "as  
15 we previously have discussed briefly, the possibility of  
16 requiring Premera to throw additional cash into the deal."

17 A I see those references, yes.

18 Q Those references refer specifically to you and Mr. Fallis, do  
19 they not?

20 A Again, I'm not sure that I can make the assumption that they  
21 always mean the same thing. I think in the first part of  
22 that sentence it probably refers to the OIC and the AG's  
23 Office rather than to the consultants. I think on the third  
24 line "we" probably refers to the OIC, the consultants, and  
25 the Attorney General's Office.

1 Q Did you go back to Mr. Hamje at this or any point,  
2 Mr. Cantilo, and tell him that, in the judgment of Assistant  
3 Attorney General Fallis, there was considerable uncertainty  
4 as to whether Premera was a charitable corporation?

5 A I don't think so, no.

6 Q Now, you knew that Premera did not assume and would not  
7 accept your assertion that it had a fundamental legal  
8 obligation to transfer 100 percent of its fair market value  
9 as part of this conversion, did you not?

10 A No.

11 Q No, you had no such knowledge?

12 A No to the question the way you articulated, which is  
13 different from the second time you articulated.

14 Q At the point that you wrote in your report, Mr. Cantilo, that  
15 there was a fundamental legal obligation on the part of  
16 Premera to transfer 100 percent of its fair market value to  
17 charity as a result of this transaction or as part of this  
18 transaction, did you believe that Premera would accept that  
19 proposition?

20 A My recollection, Mr. Mitchell, is that our report was careful  
21 both in explaining the basis for that assumption and in  
22 identifying apparently inconsistent statements by Premera  
23 recent to our first report in October.

24 Q Well, you knew at the time you wrote in your October report  
25 that Premera was not going to accept that proposition, didn't

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

I, SUE E. GARCIA, a duly authorized Court Reporter and Notary Public in and for the State of Washington, residing at Tacoma, do hereby certify:

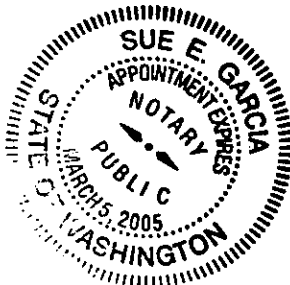
That the foregoing deposition of PATRICK CANTILO was taken before me on the 22nd of March, 2004, and thereafter transcribed by me by means of computer-aided transcription, that the deposition is a full, true, and complete transcript of the testimony of said witness;

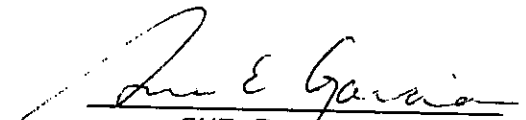
That the witness, before examination, was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth, and that the witness RESERVED signature;

That I am not a relative, employee, attorney, or counsel of any party to this action or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

That upon completion of signature, if required, I shall herewith securely seal the original deposition transcript and serve the same upon ROBERT B. MITCHELL, counsel for PREMIER.

IN WITNESS HEREOF, I have hereunto set my hand and affixed my official seal this March 26, 2004.



  
SUE E. GARCIA  
WA Lic. No. 2781